No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, AND ITS ROCKFORD AND BELOIT ASSOCIATIONS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. The National Labor Relations Board begins its argument by correctly stating that it is the policy of the Labor Mangement Relations Act of 1947 ("LMRA") to protect "the exercise by workers of full freedom of association." NLRB Br. at 12, quoting LMRA § 1, 29 U.S.C. § 151. The Board *assumes* that "full freedom of association" means that an individual is free to terminate his membership in an organization whenever and however the individual chooses and without regard to the rules of the organization. This fallacious assumption is the distorted lens through which the Board reads the language

of the statute, the legislative history, and this Court's precedents. Accordingly, we begin by demonstrating the error of this underlying assumption.

Subject to limitations not relevant here, freedom of association most certainly includes the right of each individual to determine for himself which organizations he will seek to join. But that freedom is a richer and more complex concept than the Board allows. Freedom of association also includes the right of members of an organization, again subject to conditions not immediately relevant, to establish their own rules of membership and to require individuals who seek to join the organization to accept and abide by those rules until the group decides to change the rules. As the Court stated in *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981), in the political context, the freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Id.* at 122. The Court added:

> A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.[26]

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[26] Cf. *Ripon Society, Inc. v. National Republican Party*, 173 U.S. App. D.C. 350, 368, 525 F.2d 567, 585 (en banc) ("[a] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserve the *protection* of the Constitution . . .") (emphasis of the court), *cert. denied*, 424 U.S. 933.

[450 U.S. at 124 & n.26.]

The point is not that union membership rules of the kind at issue here are beyond Congress' power to regulate but rather that the Board errs in proceeding on the assumption that the policy of "full freedom of association" stated in § 1 of the LMRA implies a congressional decision to permit employees to join unions on an "at-will" basis even though the union members have established

limitations on the time and circumstances under which an individual who chooses to join the union may resign his membership. To the contrary, the policy favoring associational freedom is better read to mean that Congress intended to protect the right of union members to make and enforce rules binding on all who voluntarily join the organization, including rules governing resignations.[1]

2. The Board attempts to buttress it's misconceived view of the "full freedom of association" by asserting that "rules restricting the right to resign from voluntary associations were generally unknown in the common law." NLRB Br. at 19 n.9.[2] If by that the Board means simply that, in general, private associations have not *chosen* to adopt rules restricting the right to resign and that therefore members generally are free to resign at will, the Board may well be correct. But if the Board intends to imply that where the members of an organization adopt a rule regulating resignation that rule would not be enforceable at common law, the Board is simply wrong; as we showed in our opening brief, the common law rule—applied in the numerous cases we cited at pp. 35-37 of our brief—is that "[w]here the rules of an association provide for the withdrawal of members, there can be no withdrawal except in the matter and on the conditions prescribed." Petr. Br. at 35, *quoting* 7 C.J.S. *Associations* § 22. Thus, the common law of membership associa-

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[1] The Board "do[es] not challenge . . . that the disciplined employees voluntarily joined the union in the first instance." NLRB Br. at 17-18.

[2] In support of that statement the Board cites Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930). The Board does not illuminate its citation with any indication as to what within that article the Board believes supports its assertion, and our reading of the article discloses no discussion that in any way speaks to, much less supports, the Board's statement.

tions supports our view—and not the Board's view—of the meaning of associational freedom.[3]

3. The Board's attempt to ascribe to the decisions in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967),

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[3] The Board asserts that the cases we cited in our opening brief applying the common-law rule "are far removed from the union-member relationship." NLRB Br. at 30-31 n.20. But of course our point in citing those cases was to illustrate the *general* rule pertaining to associations, and the Board does not deny that the cases we cited support the statement of black-letter law set forth in text. The Board is thus reduced to arguing that the rule that applied to every other type of membership association did not apply to unions. *See* NLRB Br. at 29-30 & n.10.

None of the cases the Board cites supports that peculiar proposition. Those cases did not involve a union attempt to enforce a restriction on resignations and so far as can be determined from the opinions, the unions in those cases did not even have a resignation rule. Indeed, in the first case the Board cites, which was decided after the enactment of the LMRA, the court noted that "the Union itself recognized a right to resign," and stated:

> We agree that the proviso [to § 8(b)(1)(A)] protects the Union's right to make its own rules with respect to membership, but assuming, *arguendo*, that a rule wholly prohibiting voluntary resignations would be valid, we think that in the absence of any rule on the subject of voluntary resignation, the proviso is inapplicable. [*Communication Workers v. NLRB*, 215 F.2d 835, 837 n.5, 838 (2d Cir. 1954).]

Thus, neither *Communication Workers* nor the other cases the Board cites stands for the proposition "that, at the time Congress acted, it was generally understood that . . . members were free to resign at will," NLRB Br. at 29, and the dictum in those cases concerning the freedom of members to resign simply reflect the common-law rule that in the *absence* of a resignation restriction members of a voluntary association are free to resign at will.

The Board also cites in this context *Developments in the Law—Judicial Control of Private Associations*, 76 Harv. L. Rev. 983 (1963). The Board prefaces the citation with the words "see generally"; we have done so and we can find nothing in that Note of relevance to the subject of resignations from unions or other membership associations.

and its progeny the "basic premise that Section 8(b)(1)(A) permits union discipline only over those who voluntarily are then union members," NLRB Br. 15, is equally flawed.

We agree, *see* Petr. Br. 16-17 & n.4, that this Court's decisions establish that union rules are binding only on, and enforceable in court only against, employees who choose to become full union members. But that is because, as the Court has explained, "the power of the union over the member is certainly no greater than the union-member contract." *NLRB v. Textile Workers*, 409 U.S. 213, 217 (1972). In this case, however, the Board is contending that the union's power is *lesser* than the union-member contract—that a critical aspect of that contract, the provision regulating resignations, is unenforceable as a matter of federal law. That proposition hardly follows from the prior holdings confining the union's disciplinary power to the union-member contract. Thus, the fact that union rules are unenforceable against persons who do not choose to become full union members tells us nothing about the extent to which union rules limiting resignation are enforceable against those who do choose to do so.

It is also true that in each case in which this Court has upheld union discipline the union in question had not adopted a rule limiting resignation, and the Court has recognized that where an employee "may leave the union" and has "chosen to become and remain [a] union member," *Scofield v. NLRB*, 394 U.S. 423, 235 (1969), his claim that union discipline is coercive and hence violative of § 8(b)(1)(A) is particularly weak. But that recognition falls well short of an endorsement of the proposition that full union members have an absolute freedom to leave the union however and whenever they desire.

Indeed, in those cases in which the Court has held union discipline of a former member *unlawful*, the Court has relied on the fact that the unions there did *not* have

any regulation governing resignations to prove that the member's resignation ended the contractual relationship between the union and the member and hence ended the union's power to enforce the contract. For example, the Court in *Textile Workers* reasoned as follows:

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street. [409 U.S. at 217].

Thus, the predicate for the holding in *Textile Workers* was the absence of a rule governing resignations.[4] And the lesson to be drawn from *Textile Workers* and the other cases is that the enforcement of a union rule, through legal procedures, as against one who assented to the rule by voluntarily joining the union generally is not unlawful.

4. The Court has recognized one exception to the general rule permitting unions to enforce the union-member contract: enforcement is not permitted if a particular union rule "frustrates an overriding policy of the labor

[4] This is clear in the very sentence of *Textile Workers* which the Board quotes in part in concluding its discussion of this Court's decisions. *See* NLRB Br. at 16-17. The Board's partial quotation attributes to the Court the following conclusion: "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May . . ." *Id.* In fact, however, what the Court actually said is that "*where, as here, there are no restraints on the resignation of members,* we conclude that the vitality of § 7 requires . . ." 409 U.S. at 217 (emphasis added). That sentence read in full leaves no doubt that, at the very least, this Court's decisions do not rest on the premise that the precondition for lawful union discipline is that the disciplined member is free to resign at will.

laws." *Scofield*, 394 U.S. at 429. The Board argues that a rule restricting resignations does "frustrate" federal labor policy, and the Board points to two sources within the LMRA (aside from § 1 discussed above) which it is said embody a policy allowing union members to resign at will. Neither source provides sustenance to the Board.

(a) The Board first relies on the LMRA provisions respecting union security agreements, *i.e.*, the congressional decision to ban collective bargaining agreements which require employees to become full union members as a condition of employment and to permit only those union security agreements which condition employment on the payment of union dues. *See* NLRB Br. at 21-24. The Board finds in that congressional decision "a clear policy choice in favor of voluntary unionism." *Id.* at 23. But the Board wholly misunderstands the nature of the policy that Congress in fact adopted.[6]

[5] In connection with the *Scofield* qualification quoted in text the Board observes that "a union constitution is best conceptualized as a contract of adhesion." NLRB Br. at 19 n.9. While the relevance of the observation is not immediately apparent to us, we nonetheless hasten to point out that the suggested "conceptualiz[ation]" is in any event unsound. Unlike a contract of adhesion, the terms of a union constitution are determined by the *members* acting through democratic processes, and the terms can likewise be changed by the members if the majority so desires. *See Allis-Chalmers*, 388 U.S. at 190-91 & n.27. Because that is so, no court has declined to enforce a provsion of a union constitution on the theory the Board here propounds, and this Court has not only sustained union constitutions but also has deferred to the union's construction of its constitution. *See Boilermakers v. Hardeman*, 401 U.S. 233 (1971); *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982).

[6] The Board also gravely overstates the degree to which the union rule at issue here deprived union members of the freedom to leave the union. The rule at issue here prohibits resignations only "during a strike or lockout, or at a time when a strike or lockout appears imminent." Moreover, that rule—which was adopted by the vote of the members—was enacted ten months before a strike began, and any individual who was dissatisfied with the rule was free to resign during that interval.

The point of §§ 8(a)(3) & (b)(2), as this Court has explained, is to "prevent[] the union from inducing the employer to use the emoluments of the job to enforce the unions' rules." *Scofield*, 394 U.S. at 429. Congress understood—as the Board now does not—that there is a world of difference between union actions enforceable against all employees through sanctions applied by the employer (including loss of employment), and union actions that do not affect job rights, enforceable only through internal union proceedings or the courts and enforceable only against those who choose to become full union members. Congress concluded that only the former threatens "voluntary unionism" and Congress acted to secure such voluntarism by barring employment-related sanctions.

There is not one word in the legislative history to suggest that Congress viewed union enforcement of its own rules, including rules restricting resignations, as inconsistent with "voluntary unionism" or that Congress acted to interfere with such enforcement.[7] To the contrary, the legislative history shows that "Congress intended to distinguish between the external and internal enforcement of union rule." *NLRB v. Boeing Co.*, 412 U.S. 67, 73 (1972). As Senator Taft explained, in discussing § 8(b)(2):

> *The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, *and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion. [2 Leg. Hist. 1097].

[7] We note that Senator Ball's floor statement on which the Board places particular reliance, NLRB Br. at 23, not only fails to support the Agency's position but is, in any event, without authority, because it was made to explain Senator Ball's extreme amendment, opposed by Senator Taft and rejected by the Senate on a vote of 21 yeas and 57 nays, to abolish the union shop. *See* 2 Legislative History of the Labor Management Relations Act of 1947 (GPO) 1418-1420; *id.* at 1420 (Senator Taft); *id.* at 1427-1428 (recording the vote on the Ball Amendment).

Thus the Board is correct in viewing the legislative history of §§ 8(a)(3) & (b)(2) as relevant here, but the Board has the lesson of that history exactly wrong; the true lesson is the one this Court drew in *Allis-Chalmers*:

> Congressional emphasis that § 8(b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8(b)(1)(A) as contemplating regulation of internal discipline. [388 U.S. at 185]

(b)(i) The Board also attempts to find a right of a union member to resign at will in the conjunction of the LMRA's addition to § 7 of a "right to refrain" from engaging in concerted activities and the enactment at the same time of § 8(b)(1)(A)'s proscription on union "restrain[t] or coerc[ion]" on employees exercising § 7 rights. The Board states that read together these provisions were "intended to insure that employees, including union members, would be protected against union restraint or coercion in any decision to refrain from union or other concerted activity, including a strike." NLRB Br. at 25. The Board's statement is, in terms, unobjectionable, but that statement begs the critical questions: what do "refrain" and "restrain or coerce" mean?

The Board apparently believes that Congress intended those terms to be defined so as to leave those who choose to become full union members free from union discipline for violating a union rule requiring the member's participation in "union or other concerted activity." But the decisions in *Allis-Chalmers*, *Scofield*, and *Boeing* establish that the Board's belief is mistaken. Those decisions teach that disciplining a union member, through legal processes, for

breaching a rule requiring participation in a concerted activity does not "restrain or coerce" the individual in the exercise of his "right to refrain" from engaging in concerted action.[8] And the Board does not explain—indeed cannot explain—why, on its theory, it is permissible for a union to enforce a rule against abandoning a strike, but it is not permissible to enforce a rule against abandoning the union during a strike. Since the one does not "restrain or coerce" the member in the exercise of his § 7 rights, neither does the other.

(ii) Far from supporting the Board's contention that §§ 7 & 8(b)(1)(A) grant union members the right to resign at will, the legislative history of the LMRA shows that Congress affirmatively decided not to interfere with such internal union affairs. The Board's treatment of these aspects of the legislative history cannot withstand analysis.

First, the Board misreads the legislative history of the proviso to § 8(b)(1)(A) which protects "the right of a labor organization to prescribe its own rules with respect to the acquisition *or retention* of membership."[9] The Board contends that "Congress intended . . . to preserve

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[8] *Allis-Chalmers* concludes that this is so because imposing a fine, through legal processes, for breach of a rule to which the member voluntarily asserted by joining the union does not constitute restraint or coercion. *See* 388 U.S. at 179. It is also true that the "right to refrain" stated in § 7 does not and was not intended to connote a right to abandon at will an agreed-upon undertaking. *See* Petr. Br. at 26.

[9] In upholding union discipline, this Court has heretofore found that the discipline was not within the reach of § 8(b)(1)(A)'s proscription, and thus the proviso's "interpretation [was not] necessary to [the] conclusion." *NLRB v. Boeing Co., supra*, 412 U.S. at 71 n.5. The same is true here, but the proviso provides an independent basis for concluding that Congress did not intend to interfere with union rules governing the "retention of membership." Indeed the very purpose of the proviso was to assure that union rules governing the "acquisition or retention of membership" would survive any possible interpretation of §§ 7 & 8(b)(1)(A).

only the power of unions to admit or expel individuals wanting to gain or maintain membership." NLRB Br. at 35. But while the legislative materials the Board cites show that this was *a* purpose of the proviso, the materials do not support the Board's contention that this was the *only* purpose. The Board simply overlooks not only the statutory language but also the authoritative statements of a broader and more general purpose[10]—for example, Senator Ball's statement that the proviso "is designed to make it clear that we are not trying to interfere with the internal affairs of a union," 2 Leg. Hist. 1200, and his further statement that the proviso "covers the requirements and standards of membership in the union itself," *id. See also* Petr. Br. at 19-21.[11]

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[10] Senator Ball's statements with respect to the meaning of the proviso are authoritative as he was the sponsor of the amendment to the Senate bill that added § 8(b)(1)(A), 2 Leg. Hist. 1018, and as such he accepted, as an amendment to his amendment, the proviso proposed by Senator Holland, 2 *id.* 1114. (This is in contrast to Senator Ball's statements with respect to § 8(b)(2), which are not authoritative as he dissented from the consensus on that provision. *See* n.7, *supra.*)

[11] The Board relies on the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") to limit the reach of the proviso to § 8(b)(1)(A) of the LMRA of 1948, NLRB Br. at 35-36, but that reliance is misplaced. During the course of the House's consideration of the LMRDA, Rep. Powell offered an amendment which would have made it unlawful for a union to "refuse membership, segregate or expel any person on the grounds of race, religion, color, sex or national origin." 2 *NLRB Legislative History of the LMRDA* at 1648. Representatives Landrum and Griffin opposed that amendment arguing, *inter alia*, that its enactment would overturn the proviso to § 8(b)(1)(A). 2 *Id.* at 1649. But neither Representative Landrum nor Griffin suggested that the proviso applied only to union rules governing admission and expulsion of members; to the contrary, neither representative even used the word "expel" and each stated that the proviso protects union rules governing the "*retention* of membership." *Id.*

The Board somehow thinks it significant that the LMRDA defines the word "member" to mean one "who has fulfilled the requirement for membership . . . and . . . has neither voluntarily

Second, the Board fails to come to grips with the significance of the fact that in enacting the LMRA Congress expressly rejected a set of provisions, included in the House bill as §§ 7(b) and 8(c), which were designed to regulate internal union affairs including, most particularly, a provision (§ 8(c)(4)) which would have made it unlawful for a union "to deny to any member the right to resign from the organization at any time." *See* Petr. Br. at 22-32. The Board, ignoring the fact that the entirety of §§ 7(b) & 8(c) were dropped in conference, pretends that a particularized judgment was made to omit § 8(c)(4) and hypothesizes the following explanation: "[b]ecause the more general 'right to refrain' [from engaging in concerted activities] language added to Section 7 encompasses the specific act of resigning from the union, it is reasonable to assume that Congress believed that a specific provision covering resignation was unnecessary." NLRB Br. at 29.

Even assuming *arguendo* that there were some basis for believing that § 8(c)(4) did not fall with the entirety of §§ 7(b) & 8(c), the Board's hypothesized explanation still would not stand for that explanation simply assumes its conclusion—that § 7 was intended to confer a right to resign from a union at will. The Board cites no evidence to support its contention that Congress so understood the "right to refrain" from concerted activities,[12]

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withdrawn from membership nor has been expelled or suspended. . ." 29 U.S.C. § 402(o). But this definition merely states the universe of possible ways in which one who has acquired membership status can forfeit that status; because Congress was not legislating with respect to ways of retaining membership, no possible inference can be drawn from this definition as to Congress' view in 1959 of union ruler limiting resignations. It is noteworthy, however, that in § 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), Congress did carefully protect a union's right to "adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

[12] As we explained in our opening brief (at 25-26), the stated purpose of the "right to refrain" was only to "assure that . . . the

nor does the Board offer any support for its "reasonable . . . assum[ption]" that § 8(c)(4) was dropped from the House bill because it was seen as "unnecessary."

In fact, the conference report concerning the LMRA belies the Board's theory. That report does *not* state that § 8(c)(4) is contained in substance in §§ 7 & 8(b)(1)(A) and therefore was dropped as "unnecessary" (although the report does make a similar statement concerning *other* provisions in the House bill where that was, in fact, the conference committee's reason for omitting such provisions, *see, e.g.* 1 Leg. Hist. 543-544). To the contrary, the conference report acknowledges that, with two exceptions not here relevant, *all* of the provisions of § 8(c) of the House bill "are omitted from the conference agreement." 1 *Id.* 550.

The fair reading, then, of the conference committee action—especially in light of all the other evidence of the Senate's desire not to intrude upon internal union affairs, *see* pp. 7-8, 10-11, *supra*, — is that, in the face of "a predictable presidential veto," *Pipefitters v. United States*, 407 U.S. 388, 409 (1972), and the need to attract sufficient votes in the Senate to override that veto, here, as with so many other provisions of the LMRA, "obviously the House conceded on this issue to the Senate," *NLRB*

Board will be prevented from compelling employees to exercise such [§ 7] rights against their will."

The NLRB attempts to attribute a broader purpose to that right by quoting Representative Hoffman's statement that § 7 gave workers "the right to join or not to join, to be bound or not to be bound by union rules." NLRB Br. at 25 n.17. But those words were spoken as part of Hoffman's unsuccessful effort to amend the House bill on the House floor to ban the union shop. And even if his statements were authoritative—and they are not—they would establish nothing more than a congressional intent to protect workers from employment-related sanctions in deciding whether to join a union, *see* pp. 7-9 *supra*; nothing in Representative Hoffman's rhetoric suggests an intent to establish a right of union members to resign at will.

v. Hendricks County Rural Electric Corp., 454 U.S. 170, 184 (1981). And Congress' action in abandoning the provisions regulating internal union affairs (including the proposed § 8(c)(4)) "strongly mitigates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). *See also* Petr. Br. at 32-33.[13]

[13] In addition to the provisions discussed in text, the House bill also included, as part of its version of § 8(b)(1)(A), a proscription on union efforts "by intimidating practices . . . to compel or seek to compel any individual to become *or remain* a member of any labor organization"; this language also was omitted from the bill as enacted in favor of the Senate's more limited version of § 8(b)(1)(A). *See* Petr. Br. at 24-34. The Board asserts that "the final version of Section 8(b)(1)(A) was broad enough to include these specific unfair labor practices [included in the House bill] and that the House bill's language was therefore merely redundant." NLRB Br. at 28. But the only source the Board cites for this assertion is p. 44 of the conference report, 1 Leg. Hist. 548, which says nothing of the kind. The cited page does not even discuss § 8(b)(1)(A) in terms but rather states that the Senate version of § 8(b) *as a whole* was "broader in scope than the corresponding provision of the House bill"—a reference to the fact that the Senate's § 8(b) included four more subsections than the House's and covered a number of subjects, such as secondary boycotts, not covered in the House's § 8(b). But there is nothing in the conference report to suggest, as the Board urges, that with respect to those subjects that were treated in both the Senate and House bills (such as interference with § 7 rights), the conferees intended, in adopting the narrower Senate language, to give it the same reach as the much broader House language.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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